IN THE COURT OF APPEAL OF MALAYSIA

Coram: Idrus Harun, JCA; Suraya Othman, JCA; Stephen Chung Hian Guan, JCA

Yeoh Seng Keong v Bircher Asia Pacific Sdn Bhd

Citation: [2018] MYCA 260 **Suit Number:** Civil Appeal No. M-02(NCVC)(W)-466-03/2017

Date of Judgment: 19 July 2018

Corporate law – Director – Fiduciary duty – Whether the appellant, as a nominee director, owed any fidelity and or fiduciary duty to the respondent – Whether the trial court had erred when it decided that the appellant had breached his fiduciary duties – Whether the trial judge had erred in awarding general damages to the respondent for breach of duties of fiduciary and fidelity by the appellant

JUDGMENT

BACKGROUND OF THE CASE

[1] In this appeal we shall refer to the Appellant and Respondent as the 1st Defendant and Plaintiff respectively as they were referred to in the High Court suit. In the suit the Plaintiff contended that the 1st Defendant was the alter ego and controlling mind of the 2nd Defendant with his wife Lim Ai Theng (PW13) and his brother-in-law Lim Kok Ming (PW14) being the two shareholders and directors as his nominees in the 2nd Defendant. The Plaintiff claimed for a declaratory order and for damages against the Defendants.

[2] The Plaintiff had contended as follows:

(i) the 1st Defendant had planned his exit from the Plaintiff and had approached several of its competitors to obtain sole distributorship of their products in Asia Pacific through the 2nd Defendant;

(ii) in January 2013 the 1st Defendant bought a Galaxy Note II smart phone which was wrongly charged to the Plaintiff;

(iii) in March 2013 the 1st Defendant disposed and delivered the Plaintiff's products to the 2nd Defendant, addressed to himself;

(iv) the 1st Defendant fraudulently disposed of the Plaintiff's company vehicle to himself for a purchase price of RM160,000.00 by way of a directors' resolution with the signature of one of the directors being forged;

(v) the web page listing its suppliers for whom it distributed products to end users were similar to the products marketed and sold by the Plaintiff and the 1st Defendant being a director had inside knowledge of such niche products and its marketability;

(vi) Procon Electronic's webpage, a supplier of products similar to that of the Plaintiff, listed the 2nd Defendant and later McGrada Industry, newly established by the 1st Defendant, as its distributors;

(vii) the 1st Defendant had committed misconducts whilst employed by the Plaintiff;

(viii) the 1st Defendant had committed acts of sabotage and or conspiracy against the Plaintiff;

(ix) the 1st Defendant had wrongfully used trade secrets and confidential information of the Plaintiff; and

(x) had transacted businesses using the 2nd Defendant in conflict with the Plaintiff.

[3] The 2nd Defendant did not enter appearance and judgment in default was entered against the 2nd Defendant. The 1st Defendant filed a Defence and denied the Plaintiff's allegations. After the trial the judge entered judgment for the Plaintiff in the following terms:

(a) a declaration that the 1st Defendant was the alter ego of the 2nd Defendant and that both the Defendants are jointly liable for the damages and cost awarded;

(b) that the 1st and 2nd Defendants pay the Plaintiff a sum of RM346,479.60 together with judgment interest at the rate of 5% per annum from date of judgment; and

(c) that the 1st and 2nd Defendants pay cost of RM50,000.00.

[4] This is the appeal of the 1st Defendant against the decision of the trial judge. The grounds of the appeal are set out in the memorandum of appeal and it is not necessary to set them out here.

THE CASE FOR THE APPELLANT/ 1ST DEFENDANT

[5] The 1st Defendant submitted that he did not owe a fiduciary duty to the Plaintiff and it is trite that a company and its directors are separate and distinct from each other. It was submitted the 1st Defendant could not be held liable for the discrepancies in the Plaintiff. It was submitted that from a plain reading of the Plaintiff's statement of claim, it would clearly imply that the Plaintiff was not seeking for the corporate veil to be lifted and that the lifting of the corporate veil was not consonant with the facts and the pleaded case.

[6] It was submitted that there was not an iota of evidence proffered by the Plaintiff to show that the 1st Defendant had purportedly misused trade secrets and confidential information to his advantage and it was absurd for the Plaintiff to assume that an introductory e-mail to ASO Safety tantamount to misuse of trade secret and confidential information. It was submitted that it was established that the Plaintiff did not own any intellectual proprietary rights whatsoever of the products and in that premise, the Plaintiff had not established whether the 1st Defendant had in fact owed them a fiduciary duty.

[7] The 1st Defendant submitted that he was not the alter ego of the 2nd Defendant and it was explicit from the Plaintiff's witnesses that the 1st Defendant was not a shareholder and neither was he a director of the 2nd Defendant. It was submitted that it had been established that the 1st Defendant did not sign any financial statements of the 2nd Defendant and given these pertinent facts, that it was preposterous to say that the 1st Defendant was the mind and brain of the 2nd Defendant.

[8] It was submitted that the Plaintiff's witnesses in particular Lim Ai Teng confirmed that the 1st Defendant did not partake, control or even manage the business of the 2nd Defendant. It must be highlighted that there was no profit recorded by the 2nd Defendant and in such circumstances, it was rather presumptuous for the Plaintiff to conclude that the 1st Defendant was the person who set up the 2nd Defendant.

[9] The 1st Defendant submitted that the trial judge had erred when he ruled that the 1st Defendant had instructed PW10 to forge the signature of Daniel Nef because PW12 who was a document examiner was of the opinion the impugned signature was not probably signed by Daniel Nef. It was submitted that there was no cogent and conclusive evidence to show that the 1st Defendant had forged the signature of Daniel Nef. It was submitted that PW12 had confirmed that her opinion was not affirmative and she could only conclude that the signature was most probably not belonging to Daniel Nef. It was submitted that PW12 was uncertain in her observation and had manifestly failed to state in her report the methodology or analysis adopted in her examination before arriving at her conclusion.

THE APPEAL

[10] This is our decision. Based on the facts as set out in the Record of Appeal, the Plaintiff, a wholly owned subsidiary of Bircher Reglomat Holdings AG of Switzerland (parent company), was in the business of assembling and sale of electronic apparatus for safety edge systems and sensors which were manufactured by its associate companies in Europe. The 1st Defendant was an employee and became its General Manager (GM) and then a director of the Plaintiff. The other two directors were Daniel Nef, who was based in Switzerland, and Christina Lim (PW10) who was also an employee of the Plaintiff.

[11] The contract of employment between the Plaintiff and the 1st Defendant prohibited the 1st Defendant from carrying/ doing any business which compete with the Plaintiff, from disclosing the Plaintiff's trade secrets to outsiders, not to secretly undermine the Plaintiff's business and not to solicit

or pinch its clients to the detriment of the Plaintiff.

[12] On 19.12.2012, the 1st Defendant sent an email to the CEO of the parent company of the Plaintiff recommending to cease its business operation in Malaysia because it was not profitable and it should offer a retrenchment scheme to the employees should the Plaintiff cease its operation. On his recommendation, the Plaintiff ceased its business in Malaysia.

[13] The Plaintiff then discovered that the 1st Defendant, while still in the employment of the Plaintiff, had established the 2nd Defendant to carry on business in competition with the Plaintiff. The 2nd Defendant was incorporated on 27.08.2012 with his wife and brother-in-law as the two shareholders and directors.

[14] The Plaintiff by a letter, dated 21.05.2013, terminated the 1st Defendant for gross breaches of duties of fiduciary and fidelity and lodged a police report on 19.08.2013 on the forgery of the signature of one of the Plaintiff's directors in the director's resolution.

[15] In this appeal, the first issue for determination was whether the 1st Defendant owed any fidelity and or fiduciary duty to the Plaintiff? Counsel for the 1st Defendant submitted that he was a mere nominee director, did not receive any director's remuneration and was solely appointed to fulfil the statutory requirements of two local resident directors in Malaysia. It was submitted that in order to perform his duties efficiently and effectively, it was necessary for him to possess all information in relation to the Plaintiff's products including product specification, list of suppliers and pricing lists and the information was not exclusive to him but also accessible and within the knowledge of other employees. It was submitted that the information was not confidential in nature and available to the public at large. It was submitted that, in the light of the evidence and circumstances of the case, the trial judge had erred when he decided that the Plaintiff had discharged the burden on a balance of probabilities that the 1st Defendant had breached his fiduciary duties which warranted appellate intervention.

[16] Based on the Appeal Record, at the material time the Plaintiff had three employees namely PW10 in charge of accounts and office administration, Ng Sook Mei (PW8) in charge of logistics and customer relations and the 1st Defendant as its GM. Both reported to the 1st Defendant.

[17] Pursuant to the employment contract dated 16.10.2000, since then the 1st Defendant had been in the employment of the Plaintiff. In 2006 he became the GM. Under his employment contract, he agreed to be bound by the rules and regulations of the company which included that he abided by a high degree of professional and personal ethics and not allowed to engage in any activities which were in conflict with the interest of the company: see s.132(2) of the **Companies Act 1965 (CA)**. As an employee, the 1st Defendant owed a duty of fidelity to the company: **Attorney General v Blake (Jonathan Cape Ltd Third Party)** [2001] 1 AC 268.

[18] On 10.9.2008 he was appointed a director of the Plaintiff. The record of his appointment as a director had been filed with the Companies Commission of Malaysia (CCM). PW10 was also appointed a director. Daniel Thomas Nef was only appointed a director on 23.11.2012. It should be

noted that this was after the 2nd Defendant was incorporated on 27.8.2012 and not long before the employment of the 1st Defendant was terminated vide a letter dated 21.5.2013. These facts were not in dispute.

[19] The trial judge had referred to s.4 of the **CA**. The 1st Defendant's appointment as a director of the Plaintiff came within the definition of s.4 notwithstanding his submission that he was a mere nominee director.

[20] The Appeal Record established that the 1st Defendant had received remuneration as a director of the Plaintiff. He had signed the Plaintiff's annual financial statements, statutory directors' reports and the directors' resolutions. He had acted as a director and had performed his duties as a director of the Plaintiff. It was never suggested that he was reluctant or never agreed to be appointed to act as such. These contradicted his submission that he was a mere nominee.

[21] Under s.132 of the **CA**, a director shall at all times exercise his power for a proper purpose and in good faith in the best interest of the company, with reasonable care, skill and diligence and the knowledge, skill and experience which may be reasonably expected of a director having the same responsibilities. Therefore the trial judge was correct in finding that the 1st Defendant being a director of the Plaintiff owed a fiduciary duty and must act in the best interest of the company: see **Boardman and another v Phipps** (1967) 2 AC 46; **Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (On Their Behalf And For The 213 Sub-Purchasers Of Plots Of Land Known As PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) And Other Appeals** [2015] 1 MLJ 773.

[22] Was there any breach of his duties? The 1st Defendant testified that he was not a shareholder or director of the 2nd Defendant and did not partake in the business activities even after his departure from the Plaintiff. He said the 2nd Defendant was a family business owned and set up by his wife and her brother. It was submitted that there was no wrong committed in their setting up their family business, there was no requirement for him to make disclosure about his wife's business and he was not contractually bound to the Plaintiff regarding issues surrounding the 2nd Defendant. It was submitted that the overwhelming evidence clearly showed that he was incapable of directing and controlling the establishment of the 2nd Defendant. It was submitted that the Plaintiff's contention on the lifting of the corporate veil was not the pleaded case of the Plaintiff but that the trial judge had failed to address this point in his judgment.

[23] Reading the judgment, the trial judge did not refer to nor rely on the law to pierce the corporate veil in his ruling that the Plaintiff had established that the 1st Defendant had breached his fiduciary duties. The issue of lifting the corporate veil was not pleaded and was not an issue for trial. Therefore it was not necessary for the trial judge to deal with it or to address it in his judgment. There was no merit on this submission.

[24] As stated above, the record showed that the 2nd Defendant was incorporated on 27.8.2012 with the 1st Defendant's wife (PW13) and his brother-in-law (PW14) as the two shareholders and

directors. The 1st Defendant's employment was terminated vide a letter dated 13.5.2013. As stated, the 2nd Defendant did not contest the suit but PW13 was called to testify by the Plaintiff. She testified that she was solely responsible for the incorporation of the 2nd Defendant and the nature of its business. She said its initial business was in food trading and toilet hygiene system but the business was a failure and her part-time worker by the name of Shaun Lee told her there were people looking for sensor goods but that business was also a failure.

[25] Looking at the time-line, the 2nd Defendant was a new company and in business for only about nine months. She did not fully explain her role in managing the company, in ordering and selling the goods initially in food and toilet hygiene system and then sensor goods, how did she find the suppliers and the buyers, how much business, or the revenue, the costs, the profits and loss and so on. However, in her evidence, she depended on her part-time worker Shaun Lee to manage the business and had no personal knowledge in running the business. If that was the case, she did not explain why she and her brother had set up the business in the first place. This contradicted her earlier testimony that she was solely responsible for setting up the company and its nature of business. The trial judge was correct to rule that the evidence of PW13 regarding the incorporation of the 2nd Defendant and its management and operations was incredible and there was no reason to interfere with his ruling. PW14 gave similar evidence.

[26] Although it was submitted that it was Shaun Lee who had introduced his wife to the business of sensors the Plaintiff failed to call him and an adverse inference must be drawn against the Plaintiff. It was apparent that the 1st Defendant and his wife had tried to push the blame to Shaun Lee. The name of Shaun Lee was raised by his wife to try to explain why they switched from food and toilet hygiene system to sensors.

[27] On record, she did not do a good job of it and she admitted she did not know how to manage the business and she left the entire business to Shaun Lee who sometime showed her some documents regarding the business. Based on the appeal record she did not produce any such documents. She did not produce any document such as a letter of employment, identity card or receipt for payment of wages or commissions to establish that Shaun Lee was her part-time worker who managed the business of the 2nd Defendant. It was correct for the trial judge to say that PW13 was not able to provide any shred of documentary evidence as to the existence of Shaun Lee. She did not explain how Shaun Lee obtained the product specifications, pricing list, names of the suppliers and buyers of the Plaintiff bearing in mind Shaun Lee was not an employee of the Plaintiff and had no access to the information unless she gave the information to him and she was given the information by the 1st Defendant.

[28] She was also unable to explain the letter dated 30.7.2015 (exhibit P30) from the 2nd Defendant refuting the allegation of the Plaintiff that the 1st Defendant was the alter ego of the 2nd Defendant. Both she and PW14 conceded that they did not write nor sign that letter. It was not suggested that it was Shaun Lee who wrote and signed the letter. Therefore it was correct for the trial judge to point to the fact that it was the 1st Defendant who wrote and signed that letter.

[29] Based on the evidence adduced against him, the 1st Defendant failed to clear a lot of doubts on the involvement of Shaun Lee and his involvement in the business of the 2nd Defendant, in particular that the 1st Defendant was the alter ego of the 2nd Defendant. If Shaun Lee existed or was managing the business and that the 1st Defendant was not involved in the 2nd Defendant, the 1st Defendant chose not to call him to rebut the allegations made by the Plaintiff against him. That would have cleared the doubts about his involvement in the 2nd Defendant. There was no reason to interfere with the findings of the trial judge that the 1st Defendant had breached his duties to the Plaintiff.

[30] In respect of the signature of Daniel Nef, purportedly forged, although PW12 (document examiner) could not conclude that it was the 1st Defendant who had forged the signature of Daniel Nef, PW12 was of the opinion, however, that it was probably not signed by Daniel Nef. This meant that someone did. PW10 had testified that the 1st Defendant instructed her to forge the signature of Daniel Nef. The 1st Defendant submitted that PW10 was not an independent witness and not a credible witness. The trial judge had directed himself to the evidence and accepted her testimony as credible. The trail judge had the advantage of having seen and heard her in giving her testimony and there was no reason for us to disturb his finding on credibility.

[31] On the damages awarded, reading the memorandum of appeal and the submission of the 1st Defendant, the 1st Defendant did not take issues with the sum of RM10,313.05 and RM10,997.97 being retrenchment payments to PW8 and PW10 respectively or the sum of RM39,018.08 being the difference in the value of the Mercedes vehicle or the sum of RM2,679.00 being the costs of products bought by the 1st Defendant using the funds of the Plaintiff but for his own use.

[32] However the 1st Defendant contended that the trial judge had erred and misdirected himself when he awarded general damages for the sum of RM283,485.52 to the Plantiff when during trial there was not an iota of evidence from any of the Plantiff's witnesses that the Plaintiff had suffered losses in the sum of RM283,485.52. It was submitted that the trial judge had erred when he proceeded to award RM283,485.52 based on the comparison of the gross profit margin between the Plaintiff and the 2nd Defendant when there was not an iota of evidence from the Plaintiff's witnesses to explain the said comparison.

[33] The sum of RM283,485.52 as assessed by the trial judge was in respect of general damages for breach of duties of fiduciary and fidelity. It has been held that a fiduciary is liable to account for profits made in breach of that duty. The trial judge did not err in referring to the profits made by the 2nd Defendant arising from the breach and assessed that as the damages payable to the Plaintiff.

[34] We have read the appeal record and the grounds of judgment. We find that there was no appealable error in the findings of facts and law of the trial judge and there was no reason to interfere with his decision. The appeal is dismissed and the judgment of the trial judge is affirmed. The 1st Defendant shall pay costs of RM15,000.00 to the Plaintiff/ Respondent subject to allocatur. The deposit to be refunded to the 1st Defendant.

Dated: 19th July 2018

Signed

STEPHEN CHUNG HIAN GUAN
(delivering judgment of the court)
Court of Appeal Judge
Putrajaya

COUNSEL

For the Appellant: J. Sudmesh with Charlotte Williams, Messrs. Jeeva Partnership

For the Respondent: Desmond Ho with T. H. Lim, Messrs. Desmond Ho & Associates

LEGISLATION REFERRED TO:

Companies Act 1965, Sections 4, 132, 132(2)

JUDGMENTS REFERRED TO:

Attorney General v Blake (Jonathan Cape Ltd Third Party) [2001] 1 AC 268

Boardman and Another v Phipps (1967) 2 AC 46

Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (On Their Behalf And For The 213 Sub-Purchasers Of Plots Of Land Known As PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) And Other Appeals [2015] 1 MLJ 773